



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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MEMORANDUM

SUBJECT: Enforcement Discretion Guidance Regarding the Applicability of the
Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants

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TO: Regional Administrators, Regions I-X

I. Introduction

The Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments"), Pub. L. No. 107-118, enacted in January 2002, amended the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, to provide an important liability protection for parties who qualify as bona fide prospective purchasers ("BFPPs"). This memorandum provides guidance to the Regions on how the Agency intends to exercise its enforcement discretion with regard to the BFPP provision. It recognizes the important role that leasehold interests play in facilitating the cleanup and reuse of brownfields and other contaminated properties.

Many commercial properties are owned by one party and leased and occupied, in part or in whole, by one or more other parties. This type of real estate transaction can facilitate the redevelopment of brownfields. For example, some property owners are reluctant to sell excess brownfields property because they could lose control over the end use, potentially exposing them to liability if property that was cleaned up to commercial or industrial standards is used inappropriately. To prevent such property from remaining idle, essentially "mothballed," a long-term lease or a ground lease can allow a property to be reused by a separate entity, while allowing the owner to retain specified control of the property.

The mere execution of a lease does not necessarily make a tenant liable as an owner or operator under CERCLA § 107(a). However, as explained below, EPA recognizes the uncertainty regarding the potential liability of certain tenants under CERCLA, and the Brownfields Amendments' explicit reference to tenants, and offers some general guidance below to be used by EPA in exercising enforcement discretion.

This memorandum addresses those circumstances in which EPA, on a site-specific basis, intends to exercise its enforcement discretion not to enforce against the following categories of tenants:

- A tenant whose lease gives sufficient indicia of ownership to be considered an “owner” and who meets the elements of §§ 101(40)(A)-(H) and 107(r)(1).
- A tenant of an owner who is a BFPP. The guidance below also discusses how EPA will treat these tenants if the landlord loses its BFPP status during the tenancy.

Finally, this guidance discusses tools EPA may use, in certain circumstances, to address liability concerns of tenants on a site-specific basis.¹

This enforcement discretion guidance is not intended to create new liabilities or limit or expand obligations under any federal, state, tribal, or local law. EPA recognizes that each tenant situation is fact specific, and EPA may deviate from this guidance as necessary and appropriate based on the facts of each case. As EPA gains more experience implementing the Brownfields Amendments as they relate to tenants, it may revise and/or expand this guidance.

This guidance is intended solely as internal guidance to be used in exercising the Agency's enforcement discretion, and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. EPA will apply the guidance only to the extent appropriate based on the facts.

II. Discussion

a. CERCLA Liability and the BFPP Exclusion

Section 107(a)(1) of CERCLA provides that “the owner and operator of a vessel or facility . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . (A) all costs of removal or remedial action incurred by the United States Government” Thus, without liability protection, the current owner or operator of contaminated property is a potentially liable party under CERCLA. The Brownfields Amendments created such liability protection for certain owners or operators of property, called bona fide prospective purchasers or “BFPPs.” CERCLA § 107(r)(1) states:

¹ Please note that although this guidance is being issued jointly by OSWER and OECA, the authority to offer enforcement discretion is delegated to OECA.

Notwithstanding subsection (a)(1) of this section, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

CERCLA § 101(40) defines a BFPP as “a person (or a tenant of a person) that acquires ownership of a facility after [January 11, 2002]” and establishes that it meets certain threshold criteria and ongoing obligations identified at CERCLA § 101(40)(A) – (H).

EPA previously issued guidance to assist with implementation of the BFPP provision.² These guidance documents address many of the criteria a landowner must meet to qualify under the statute as a BFPP. As discussed below, these guidance documents also provide important information for tenants who may fall within the scope of this guidance.

b. Tenants with Indicia of Ownership

In assessing potential liability of a tenant under CERCLA, some courts engage in a fact-specific inquiry regarding the “indicia of ownership” found in the lease arrangement. Where a tenant's lease arrangement may provide sufficient indicia of ownership, a court could consider the tenant to be an “owner” of a facility for purposes of CERCLA liability.³ This guidance explains how EPA intends to exercise its enforcement discretion on a site-specific basis with respect to these tenants.

If a tenant has sufficient indicia of ownership to be an owner, EPA intends to exercise its enforcement discretion and consider the tenant to be a BFPP so long as the tenant complies with the requirements of CERCLA §§ 101(40)(A)–(H) and 107(r)(1). One requirement of section 101(40) is that a person must have “acquire[d] ownership” of the property after January 11, 2002. For purposes of exercising its enforcement discretion, therefore, EPA intends to treat those tenants with sufficient indicia of ownership as BFPPs if their lease agreement was entered into after January 11, 2002, provided they meet all of the requirements from section 101(40)(A)–(H) (as described more fully in the Common Elements guidance) and section 107(r)(1). In general terms, the requirements of section 101(40)(A)–(H) are: (1) not dispose of hazardous substances at the property; (2) conduct all appropriate inquiries (AAI) into the previous ownership and uses of the property prior to executing the lease; (3) provide legally required notices; (4) take reasonable steps with respect to hazardous substance releases; (5) provide cooperation, assistance and access; (6) comply with land use restrictions and institutional

² See “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA (“Common Elements”)” (Bromm, 3/6/2003); and “Bona Fide Prospective Purchasers and the New Amendments to CERCLA” (Breen, 5/31/02). These documents may be found at: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf> and <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bonf-pp-cercla-mem.pdf> respectively.

³ See, e.g., Commander Oil v. Barlo Equip. Corp., 215 F.3d 321 (2d Cir. 2000) (holding that certain lessees may have the requisite indicia of ownership vis-à-vis the property to be de facto “owners” for the purposes of CERCLA liability).

controls; (7) comply with information requests and administrative subpoenas; and (8) not be affiliated with a liable party at the facility. Section 107(r)(1) provides, among other things, that to obtain liability protection, a BFPP must not impede the performance of a response action or natural resource restoration.

With respect to the “no affiliation” prohibition, section 101(40)(H)(i)(II) provides an exception where the affiliation “is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services.” In essence, the exception makes clear that a person can acquire title to a property from a liable party and still establish itself as a BFPP. A lease, however, generally does not convey title to the property and thus would not fall within the scope of the exception. Therefore, for purposes of this guidance, where a tenant’s lease provides sufficient indicia of ownership such that the tenant could be considered an “owner,” EPA intends to exercise its enforcement discretion not to pursue those tenants, provided the other requirements discussed above are also met.⁴

c. Tenants With “Derivative” BFPP Status

The BFPP definition in CERCLA § 101(40) includes the phrase “tenant of a person,” thereby providing that a tenant may *derive* BFPP status from an owner who satisfies the BFPP requirements. The tenant remains a BFPP and will receive the liability protections of section 107(r) as long as the owner maintains its BFPP status and the tenant does not: (1) dispose of hazardous substances at the facility, as provided by section 101(40)(A); or (2) impede the performance of a response action or natural resource restoration, as provided by section 107(r)(1). Please note that this means that as long as the owner maintains compliance with the requirements of section 101(40)(B)-(H), the tenant who has derived BFPP status does not have any independent duty to carry out those responsibilities (such as conducting AAI). However, if the owner loses its BFPP status whether by its own action or inaction or that of the tenant, the tenant generally would no longer be a BFPP.

If a tenant derivatively enjoys BFPP status through the owner and the owner loses its status through no fault of the tenant, EPA may exercise its enforcement discretion not to pursue the tenant under CERCLA § 107(a)(1).⁵ EPA intends to exercise its enforcement discretion on a site-specific basis if the tenant, in a reasonable and appropriate manner considering all the circumstances and to the extent its lease permits: (1) does not dispose of hazardous substances on the property; (2) provides legally required notices; (3) takes reasonable steps with respect to hazardous substance releases; (4) provides cooperation, assistance and access; (5) complies with land use restrictions and institutional controls; (6) complies with information requests and

⁴ Note that if the tenant is otherwise affiliated with the PRP owner or has an affiliation with another responsible party at the site, the lease is designed to allow the landlord or tenant to avoid its CERCLA liability, or the tenant is potentially liable for reasons other than its status as a tenant, then EPA will likely decline to exercise its enforcement discretion.

⁵ See discussion at footnote 4 above.

administrative subpoenas; and (7) does not impede any response action or natural resource restoration.⁶ See CERCLA §§ 101(40) and 107(r).

III. Tools to Address Tenant Liability Concerns

The statutory protections found at CERCLA § 107(r)(1) and §101(40) are self-implementing, and EPA generally will not be involved with facility-specific transactions or determinations of BFPP status. There may be instances on a site-specific basis, however, where EPA determines that it would be necessary and appropriate to address a tenant's liability concerns through an existing tool or policy (*e.g.*, a comfort/status letter or a prospective lessee agreement).⁷ In addition, EPA may use such tools on a case-by-case basis where it is appropriate to address liability concerns of tenants not covered by this guidance.

IV. Agency Contacts

EPA welcomes comments on the guidance and its implementation. For more information, please contact Erin Smith at (202) 564-2038 (smith.erin@epa.gov) or Susan Boushell at (202) 564-2173 (boushell.susan@epa.gov), in the Office of Enforcement and Compliance Assurance, or Sven-Erik Kaiser at 202-566-2753 (kaiser.sven-erik@epa.gov), in the Office of Solid Waste and Emergency Response.

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⁶ Although there is no AAI requirement for a tenant with derivative BFPP status, a tenant may need to obtain information on the prior uses of the property to have an informed basis on which to comply with these requirements.

⁷ See <http://cfpub.epa.gov/compliance/resources/policies/cleanup/> for a listing of the available tools and policies.